

Supreme Court No. 91374-9
King Co. Superior Court Cause No. 13-2-21191-2 SEA

SUPREME COURT OF THE STATE OF WASHINGTON

DAVID DUNNINGTON and JANET WILSON,

Plaintiffs-Petitioners,

vs.

VIRGINIA MASON MEDICAL CENTER,

Defendants-Respondents.

PETITIONERS' ANSWER TO AMICI CURIAE WASHINGTON
DEFENSE TRIAL LAWYERS, WASHINGTON STATE MEDICAL
ASSOCIATION, WASHINGTON STATE HOSPITAL
ASSOCIATION, WASHINGTON CHAPTER—AMERICAN
COLLEGE OF EMERGENCY PHYSICIANS, WASHINGTON STATE
RADIOLOGICAL SOCIETY, AND THE WASHINGTON STATE
PODIATRIC MEDICAL ASSOCIATION

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David Dunnington and Janet Wilson (collectively "Dunnington") submit the following answer to the amicus curiae briefs filed on behalf of the Washington Defense Trial Lawyers ("WDTL") and Washington State Medical Association, et al. ("WSMA"):

I. Contrary to WDTL's claim, the substantial factor standard of causation has not been rejected by Washington courts as being "speculative."

WDTL states that the substantial factor standard of causation is "speculative," and that Washington courts have "consistently rejected" the substantial factor standard on this basis. WDTL Am. Br., at 3 (citing *Herskovits v. Group Health Coop.*, 99 Wn. 2d 609, 634-35, 664 P.2d 474 (1983); *Mohr v. Grantham*, 172 Wn. 2d 844, 857, 262 P.3d 490 (2011); *Rash v. Providence Health & Servs.*, 183 Wn. App. 612, 631, 334 P.3d 1154) (2014), *rev. denied*, 182 Wn. 2d 1028 (2015); and *Christian v. Tomeh*, 191 Wn. App. 709, 730, 366 P.3d 16 (2015)). However, none of the authorities cited by WDTL have rejected the substantial factor standard of causation as being speculative.

The pages of *Herskovits* cited by WDTL come from the concurrence of Justice Pearson. *See* 99 Wn. 2d at 619-36. Justice Pearson did not reject that the substantial factor standard as

speculative, even though he did not advocate for adoption of the standard in loss of chance cases. *See id.* As *Mohr* makes clear, the Court adopted Justice Pearson's formulation of loss of chance as a type of injury "particularly because it does not prescribe the specific manner of proving causation in lost chance cases." *Mohr*, 172 Wn. 2d at 857.

Mohr does not reject the substantial factor standard of causation either. Instead, the Court specifically reserved the issue of the standard of causation to be applied in future cases, stating that Justice Pearson's formulation "relies on established tort theories of causation, without applying a particular causation test to **all** lost chance cases." 172 Wn. 2d at 857 (emphasis in original).¹

Justice Pearson's conception of loss of chance as a percentage of the ultimate harm in *Herskovits*, which was adopted by the Court in *Mohr*, would be (and has been) subject to the same sort of criticism that WDTL makes of the substantial factor standard. *See Mohr*, 172 Wn. 2d at 857 (stating "[t]he significant

¹ *Rash* does not use the word "speculation" or any derivative thereof (e.g., "speculative") except in a quotation from another case in a part of the decision not cited by WDTL. *See* 183 Wn. App. at 640. The court declined to apply the substantial factor standard of causation based on the misimpression that *Herskovits* and *Mohr* require use of the but for standard of causation. *See id.* at 631; *accord id.* at 636 (stating "[b]ased on *Herskovits* and *Mohr* ... [plaintiff] must provide a physician's opinion that [defendant] 'likely' caused a lost chance of survival or a lost chance of better outcome"; brackets & ellipses added). *Christian* simply quoted *Rash*. *See* 191 Wn. App. at 730.

remaining concern about considering the loss of chance as the compensable injury, applying established tort causation, is whether the harm is too speculative"); *id.* at 865 (Madsen, C.J., dissenting "[t]he lost chance doctrine contravenes the long-standing rule that a verdict in a medical malpractice action must not rest on 'conjecture and speculation'"; quotation omitted). The charge of speculation is no more of a reason to reject the substantial factor standard of causation than it is a reason to reject injury in the form of loss of a chance.

In actuality, neither the substantial factor standard of causation nor the conception of loss of a chance is properly criticized as "speculative" because they represent principles of substantive law. The substantial factor standard of causation is a substantive rule of law defining the degree of proximity between a tortious act and injury required to justify the imposition of liability. Similarly, Justice Pearson's conception of loss of a chance is a substantive rule of law defining the cognizable injury. Both rules are subject to the requirement that they must be proven by a preponderance of evidence, and, where required, with medical testimony to a reasonable degree of medical probability or certainty. *See, e.g., Mohr*, at 857-58 (stating "calculation of a loss of

chance for a better outcome is based on expert testimony"). The preponderance of evidence burden of proof and evidentiary requirements eliminate any room for speculation.

II. WDTL ignores Dunnington's argument that the substantial factor standard of causation is warranted under established tort theories of causation.

WDTL appears to acknowledge that the substantial factor standard of causation is appropriate under the "established tort theories of causation" referenced in *Mohr*, 172 Wn. 2d at 857, quoting this Court's decision in *Daugert v. Pappas*, 104 Wn. 2d 254, 262, 704 P.2d 600 (1985). See WDTL Am. Br., at 5. *Daugert* expressly authorizes use of the substantial factor standard of causation in several categories of cases, including cases "where either one of two causes would have produced the identical harm." See 104 Wn. 2d at 262. However, WDTL wrongly states "the Dunningtons do not argue that this case fits within one of those categories." WDTL Am. Br., at 5. In fact, the Dunningtons have provided extended briefing regarding the application of *Daugert* in this case. See Dunnington Br., at 15-16; Dunnington Reply/Resp. Br., at 8-11. In sum, either the negligence of Dunnington's physician or Dunnington's cancer could have caused him to suffer the identical harm, i.e., a recurrence of the cancer. Accordingly, use of

the substantial factor standard of causation is warranted in this case.

III. WSMA et al. and WDTL incorrectly state that Ch. 7.70 RCW requires use of the but for standard of causation in all medical negligence cases.

WSMA et al. contend that the substantial factor standard of causation "would be inconsistent with the statute and the underlying statutory principle that the legislature has preempted this area of the law." WSMA et al. Am. Br., at 17. Presumably, the statute to which WSMA et al. refer is Ch. 7.70 RCW, but they do not provide any analysis of the statutory language. *See id.*

For its part, WDTL claims:

The "but for" standard ensures compliance with RCW 7.70.040(2) and RCW 7.70.030, which require proof that the defendant health care provider "likely" caused the plaintiff's injury—a lost chance of a better outcome. *Tohmeh*, at 28 (citing *Rash*, 183 Wn. App. at 631).

WDTL Am. Br., at 11-12 (citations in original). Neither of the cited statutes contains the word "likely" or otherwise suggests that the but for standard of causation is mandated in all medical negligence cases.

RCW 7.70.030 provides:

No award shall be made in any action or arbitration for damages for injury occurring as the result of health care which is provided after June 25, 1976,

unless the plaintiff establishes one or more of the following propositions:

- (1) That injury **resulted from** the failure of a health care provider to follow the accepted standard of care;
- (2) That a health care provider promised the patient or his or her representative that the injury suffered would not occur;
- (3) That injury resulted from health care to which the patient or his or her representative did not consent.

Unless otherwise provided in this chapter, the plaintiff shall have the burden of proving each fact essential to an award by a preponderance of the evidence.

(Emphasis added; formatting in original.) The "resulted from" language in subsection (1) of this statute is undefined and sufficiently broad to encompass use of either the substantial factor or the but for standard of causation, as may be warranted by the case.

RCW 7.70.040 provides:

The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

- (1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances;
- (2) Such failure was **a proximate cause** of the injury complained of.

(Emphasis added; formatting in original.) The "proximate cause" language in subsection (2) of this statute is also undefined and sufficiently broad to encompass use of either the substantial factor or the but for standard of causation. *See Mohr*, 172 Wn. 2d at 856 (noting Ch. 7.70 RCW "does not define 'proximate cause' or 'injury'").

Mohr's adoption of Justice Pearson's formulation of loss of a chance precisely "because it does not prescribe the specific manner of proving causation," and its recognition that "established tort theories of causation" apply to claims for loss of a chance confirm that the medical negligence statute does not require use of the but for standard of causation, and that the substantial factor standard of causation is available and should be used when appropriate.²

² Given the plain language of RCW 7.70.030 and .040 and the language of the Court in *Mohr*, *Rash* is incorrect when it states that "[n]othing in the statute [i.e., RCW 7.70.030 and .040] suggests that a substantial factor standard of causation should be employed in a medical malpractice suit." 183 Wn. App. at 635-36 (brackets added). *Christian* is likewise incorrect to the extent it seems to follow *Rash* on this point. *See* 191 Wn. App. at 730.

IV. WSMA et al. and WDTL do not address the threat of a de facto directed verdict and jury confusion resulting from the interplay between loss of a chance less than 50%, the but for standard of causation, and the preponderance of the evidence burden of proof.

WSMA et al. and WDTL do not attempt to respond to the point that a claim for loss of a chance less than 50% is jeopardized by the interplay between this type of injury, the standard of causation and the burden of proof:

- Because loss of a chance is defined as a percentage of the plaintiff's ultimate injury, the but for standard of causation places plaintiff claiming loss of a chance less than 50% in the untenable position of having to prove that something likely to happen regardless of whether the defendant was negligent (such as a recurrence of cancer in Dunnington's case) would not have happened in the absence of defendant's negligence, *see* Dunnington Br., at 12-13; Dunnington Reply/Resp. Br., at 5;
- The but for standard of causation requires the jury to make a categorical choice (i.e., would the plaintiff's injury have occurred in the absence of the defendant's negligence, or not?), whereas loss of a chance requires the jury to evaluate the plaintiff's injury along a continuum (i.e., assigning a percentage that corresponds to the chance of a better outcome in the absence of the defendant's negligence), *see* Dunnington Br., at 14-15; Dunnington Reply/Resp. Br., at 5;
- The preponderance of the evidence burden of proof requires the plaintiff to persuade the jury that s/he has established the elements of the case (including causation of the plaintiff's injury) with a confidence level greater than 50%, but, in cases involving loss of a

chance less than 50%, the confidence level required by the burden of proof is greater than the but for standard of causation and the nature of the injury will permit, *see* Dunnington Br., at 13-14; Dunnington Reply/Resp. Br., at 5-6.

WDTL ignores the foregoing analysis, and WSMA et al. simply state "there is no good reason" for using the substantial factor standard of causation, "[n]or have the Dunningtons offered a convincing rationale," without meaningfully engaging with Dunnington's briefing or providing any explanation. WSMA et al. Am. Br., at 17 & 18 (brackets added).

V. A patient's duty to follow their physician's instructions has been conceded for purposes of summary judgment and is not at issue in this review.

WSMA et al. and WDTL argue that a patient has a duty to follow their physician's instructions. *See* WSMA et al. Am. Br., at 4-15; WDTL Am. Br., at 14-15. This argument is beside the point. Dunnington moved to dismiss the contributory negligence defense raised by Virginia Mason Medical Center ("VMMC") on grounds that there was no evidence that any alleged failure to follow his physician's instructions **caused** any injury or damage to Dunnington. *See* Dunnington Reply/Resp. Br., at 18-21. The superior court dismissed the defense on grounds of **causation**. *See id.*

In response to VMMC's argument on appeal that he had a duty to follow his physician's instructions, which mirrors the argument made by WSMA et al. and WDTL, Dunnington stated:

3. VMMC's discussion of the duty of a patient to follow his or her physician's instructions is immaterial to the issue of causation.

VMMC includes in its brief an extended discussion of the general principle that a patient has a duty to follow the instructions of his or her physician. *See* VMMC Br., at 19-21. The issues of duty and breach were not the basis for Dunnington's motion for summary judgment in the superior court, and the existence of a duty and questions of fact regarding breach were assumed for the sake of argument. *See* CP 441. The issues of duty and breach are immaterial to the issue of causation, and do not eliminate VMMC's burden on summary judgment to produce evidence sufficient to support a finding that any alleged comparative fault on the part of Dunnington was a cause of his loss of a chance.

Dunnington Reply/Resp. Br., at 24 (formatting in original).

WSMA et al. even acknowledge that Dunnington has not questioned a patient's duty to follow a physician's instructions. *See* WSMA et al. Am. Br., at 5. Accordingly, the discussion of a patient's duty to follow their physician's instructions by WSMA et al. and WDTL is unhelpful in resolving the issues on review.

VI. The Court should reject the attempt by WSMA et al. and WDTL to expand upon a patient's duty of care beyond a duty to follow their physician's instructions.

WDTL asks the Court to go beyond the duty at issue in this case and specifically rule that "the patient must provide an accurate history of his or her symptoms," and "the patient must seek regular and consistent care," in addition to following a physician's instructions. WDTL Am. Br., at 15. Similarly, WSMA et al. asks the court to "reinforce[e] the patient's individual responsibility," apparently including an enhanced obligation to participate in medical decision making and to search the internet for health-related information. *See* WSMA et al. Br., at 6. Any request to expand the duty of a patient beyond the admitted duty to follow a physician's instructions in this case is not necessary to resolve this case and should be disregarded as a new issue raised by amicus. *See Harbour Village Apartments v. City of Mukilteo*, 139 Wn. 2d 604, 615, n.4, 989 P.2d 542 (1999).

By raising this issue, it is unclear to what extent amici are seeking to expand upon the duty to exercise the care of a reasonably prudent person under the same or similar circumstances. *See* 6 Wash. Prac., Wash. Pattern Jury Instr. WPI 11.01 (6th ed.) (indicating contributory negligence is negligence on the part of a

person claiming injury or damage); *Id.*, WPI 10.01-10.02 (defining negligence and ordinary care). It is also unclear to what extent amici are seeking to avoid the principle that a plaintiff has no duty to mitigate their damages—a form of "fault" under RCW 4.22.015—when the defendant has an equal opportunity to do so. *See Walker v. Transamerica Title Ins. Co.*, 65 Wn. App. 399, 405-06 & nn.7-8, 828 P.2d 621 (1992) (collecting cases). Lastly, it is unclear to what extent amici are seeking to avoid the principle that there is no duty to mitigate where the tort is continuing. *See Desimone v. Mutual Materials Co.*, 23 Wn. 2d 876, 884, 162 P.2d 808 (1945); *Public Utility Dist. No. 2 v. Comcast of Washington IV, Inc.*, 184 Wn. App. 24, 76, 336 P.3d 65 (2014) (citing *Desimone*). To avoid unintended consequences with respect to these and other issues, the Court should decline to address any duty other than a patient's duty to follow their physician's instructions in this case.

VII. WSMA et al. and WDTL do not question the requirement to prove that contributory negligence caused all or part of the plaintiff's injury, and the Court should reject any attempt to present evidence of contributory negligence or instruct the jury regarding contributory negligence in the absence of evidence of causation.

A defendant alleging an affirmative defense of contributory negligence has the burden of pleading and proving that the plaintiff

negligently caused some or all of their own damages. *See Cox v. Spangler*, 141 Wn. 2d 431, 447, 5 P.3d 1265 (2000) (stating "the burden of pleading and proving the plaintiff's negligence is on the defendant"); *see also* 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 21.03 (6th ed.) (stating issues and burden of proof for contributory negligence defense). WSMA et al. and WDTL do not appear to question the requirement to prove that contributory negligence caused all or part of the plaintiff's injury.

However, WSMA et al. appear to be seeking to present evidence of contributory negligence to the jury and instruct the jury regarding contributory negligence, even in the absence of any evidence that the alleged negligence caused the plaintiff's injury. *See WSMA et al. Am. Br.*, at 7-9. This is improper. Such evidence would be irrelevant, and the only purpose for introducing it would be to prejudice the jury. *See ER 402, 403*. Furthermore, instructing the jury on contributory negligence in the absence of evidence of causation would constitute prejudicial error. *See Albin v. National Bank of Commerce*, 60 Wn. 2d 745, 754, 375 P.2d 487 (1962) (holding it is prejudicial error to give instruction not supported by substantial evidence, even if it correctly states the law). The Court should confirm that evidence and jury instructions regarding

contributory negligence are improper without evidence that the contributory negligence caused all or part of the plaintiff's injury.

Respectfully submitted this 3rd day of October, 2016.

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